

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIAOrder Instituting Rulemaking to Revise
Commission General Order Numbers 95 and 128.Rulemaking 01-10-001
(Filed October 2, 2001)**OPINION GRANTING INTERVENOR COMPENSATION
TO WILLIAM ADAMS FOR CONTRIBUTIONS TO DECISION 05-01-030**

This decision awards \$35,678 to William Adams in compensation for his contribution to Decision (D.) 05-01-030. This represents a decrease of \$59,505 from the amount requested.

1. Background

The Commission issued this Order Instituting Rulemaking (R.) 01-10-001 to revise General Order (GO) 95 and GO 128, which govern, respectively, the construction of overhead and underground supply and communications systems. The Commission's Consumer Protection and Safety Division (CPSD), industry representatives, labor organizations and the public participated in 16 months of twice-monthly two- and three-day public workshops throughout California. A total of 63 proposed revisions to existing rules were considered. Of these, 40 revisions were supported by consensus of the workshop participants; 15 were withdrawn, and eight were in dispute. In D.05-01-030, the Commission adopted the consensus changes, noted the withdrawn proposals, resolved seven of the eight disputed change proposals, and deferred consideration of one disputed proposal to a later proceeding (R.05-02-023).

William Adams (Adams), who retired from the Commission 14 years ago after 22 years of experience as a Commission inspector and accident investigator, participated in virtually all of the workshop meetings that produced the decision in this proceeding. He requests \$95,183 for his contributions to D.05-01-030.

2. Requirements for Awards of Compensation

The intervenor compensation program, enacted in Pub. Util. Code §§ 1801-1812, requires California jurisdictional utilities to pay the reasonable costs of an intervenor's participation if the intervenor makes a substantial contribution to the Commission's proceedings.¹ In this case, the rulemaking proceeding affected a broad array of utilities and others. As such, we find it appropriate to authorize payment of the compensation award from the intervenor compensation program fund, as described in D.00-01-020.

All of the following procedures and criteria must be satisfied for an intervenor to obtain a compensation award:

1. The intervenor must satisfy certain procedural requirements, including the filing of a sufficient notice of intent (NOI) to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that we specify). (§ 1804(a).)
2. The intervenor must be a customer or a participant representing consumers, customers, or subscribers of a utility subject to our jurisdiction. (§ 1802(b).)

¹ Subsequent statutory references are to the Public Utilities Code unless otherwise indicated.

3. The intervenor should file and serve a request for a compensation award within 60 days of our final order or decision in a hearing or proceeding. (§ 1804(c).)
4. The intervenor must demonstrate “significant financial hardship.” (§§ 1802(g), 1804(b)(1).)
5. The intervenor’s presentation must have made a “substantial contribution” to the proceeding, through the adoption, in whole or in part, of the intervenor’s contention or recommendations by a Commission order or decision. (§§ 1802(h), 1803(a).)
6. The claimed fees and costs are comparable to the market rates paid to experts and advocates having comparable training and experience and offering similar services. (§ 1806.)

For discussion here, the procedural issues in Items 1-4 above are combined, followed by separate discussions on Items 5-6.

3. Procedural Issues

Adams filed his NOI on March 17, 2004. Because no prehearing conference was conducted in this matter, the NOI was filed approximately midway in the workshop process, and we deem it timely on that basis. On July 28, 2004, Administrative Law Judge (ALJ) Walker issued a ruling that found Adams to be a customer Category 1 participant, representing consumers, pursuant to § 1802(b) and eligible to file for an award of intervenor compensation, subject to a showing of significant financial hardship. Adams filed his request for compensation on March 21, 2005, within 60 days of D.05-01-030. Adams asserted financial hardship in documents filed under seal with his request for compensation.

An intervenor seeking compensation must show that, without undue hardship, it cannot pay the reasonable costs of effective participation in the

proceeding. A participant representing consumers (Category 1) or a representative authorized by a customer (Category 2) must disclose its finances to the Commission to make this showing. Adams has submitted under seal statements showing his and his wife's income, net worth and expenses. The finances of the participant, as revealed in the sealed documents, meet the statutory standard for showing financial hardship.

Adams has satisfied all of the procedural requirements necessary to make the request for compensation.

4. Substantial Contribution

In evaluating whether a customer made a substantial contribution to a proceeding, we look at several things. First, did the ALJ or Commission adopt one or more of the factual or legal contentions, or specific policy or procedural recommendations put forward by the customer? (See § 1802(h).) Second, if the customer's contentions or recommendations paralleled those of another party, did the customer's participation materially supplement, complement, or contribute to the presentation of the other party or to the development of a fuller record that assisted the Commission in making its decision? (See §§ 1802(h) and 1802.5.) As described in § 1802(h), the assessment of whether the customer made a substantial contribution requires the exercise of judgment.

In assessing whether the customer meets this standard, the Commission typically reviews the record, composed in part of pleadings of the customer and, in litigated matters, the hearing transcripts, and compares it to the findings, conclusions, and orders in the decision to which the customer asserts it contributed. It is

then a matter of judgment as to whether the customer's presentation substantially assisted the Commission.²

Should the Commission not adopt any of the customer's recommendations, compensation may be awarded if, in the judgment of the Commission, the customer's participation substantially contributed to the decision or order. For example, if a customer provided a unique perspective that enriched the Commission's deliberations and the record, the Commission could find that the customer made a substantial contribution.³ With this guidance in mind, we turn to the claimed contributions Adams made to the proceeding.

Adams states that he participated in all of the public workshops conducted throughout California. These meetings, most of which were run by a professional facilitator, culminated in 40 Proposed Rule Changes (PRCs) adopted by group consensus, withdrawal of 15 PRCs, and a determination that that eight PRCs should be taken through a dispute process that led eventually to the Commission decision.

Adams proposed and sponsored PRC 57, dealing with the sealing of service lateral ducts, to which the parties agreed by consensus. He contributed to and was one of the sponsors of PRCs 15, 29, 48, 58, 28 and 32, all of them consensus PRCs or withdrawals of PRCs adopted by the Commission. Adams also proposed six of the eight disputed rule changes, with all six rejected by the

² D.98-04-059, 79 CPUC2d 628, at 653.

³ See D.03-12-019, discussing D.89-03-063 (31 CPUC2d 402) (awarding San Luis Obispo Mothers for Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, although ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

Commission. Adams claims that his efforts were not duplicative of others and that he supplemented positions taken by CPSD.

GO 95 and GO 128 represent complex rules governing underground and overhead utilities. Because of his experience with the Commission and his subsequent electrical safety consulting work, Adams brought knowledge to the subject areas. His detailed time sheets show that he traveled to and participated in all of the workshops conducted prior to the Commission decision. On the other hand, six PRCs to which Adams devoted a substantial amount of time were rejected by the Commission. In the case of four of them (PRC 59, 60, 61 and 62), the Commission found that the changes in tree-trimming standards proposed by Adams had been considered and rejected seven years earlier in another rulemaking proceeding. We find that Adams made a substantial contribution to seven of the 63 PRCs considered in this proceeding, but that his contribution to other aspects of the proceeding was minimal and even counterproductive. We will adjust the amount awarded to Adams accordingly.

5. Reasonableness of Requested Compensation

Adams requests \$95,183 for his participation in this proceeding, as follows:

| <u>Advocate's Fees</u> | <u>Year</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|------------------------|-------------|--------------|-------------|---------------|
| William Adams | 2001 | 18.3 | \$130 | \$ 2,379 |
| | 2002 | 311.8 | \$130 | \$ 40,534 |
| | 2003 | 193.0 | \$130 | \$ 25,090 |
| | 2004 | 41.2 | \$130 | \$ 5,356 |
| | 2005 | 24.3 | \$130 | \$ 3,159 |

| | |
|---|------------|
| <u>Less</u> 50% reduction for travel time and preparation of request ⁴ | (\$12,825) |
|---|------------|

⁴ Any hours incurred for travel time or preparation of compensation requests are reduced by 50% pursuant to D.98-04-059.

| <u>Advocate's Fees</u> | <u>Year</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|---|-------------|--------------|-------------|-------------------|
| Advocate's Fees – Subtotal | | | | \$ 63,693 |
| <u>Attorney's Fees</u> | | | | |
| Connie D. Easterly | 2004 | 69.1 | \$265 | \$ 18,312 |
| | 2005 | 43.7 | \$275 | \$ 12,018 |
| <u>Less</u> 50% reduction for preparation of compensation request | | | | <u>\$ (6,009)</u> |
| Attorney's Fees – Subtotal | | | | \$ 24,321 |
| <u>Consultants' Fees</u> | | | | |
| Roger Poynts | 2004 | 1.9 | \$175 | \$ 333 |
| Jack Deschaine | 2004 | 1.8 | \$150 | <u>\$ 270</u> |
| Consultant's Fees – Subtotal | | | | \$ 603 |
| <u>Other Expenses</u> | | | | |
| Travel, Transportation & Lodging | | | | \$ 5,566.57 |
| Photocopy costs | | | | \$ 746.50 |
| Postage and delivery | | | | <u>\$ 252.93</u> |
| Total Other Expenses: | | | | \$ 6,566.00 |
| Total Fees and Other Expenses: | | | | \$ 95,183.00 |

The components of this request must constitute reasonable fees and costs of the customer's preparation for and participation in a proceeding that resulted in a substantial contribution. Thus, only those fees and costs associated with the customer's work that the Commission concludes made a substantial contribution are reasonable and eligible for compensation.

Adams states that the nature of these proceedings precludes an assessment of dollar value to the benefits of his participation. Similarly, straightforward issue allocation is difficult because the issues were intermingled with the proposed changes. Adams points out that on any given day of the workshops, numerous issues were being discussed. The agenda of PRCs scheduled for discussion changed daily, as PRCs that had not been adopted could be brought

into the agenda at any time. Subcommittees were formed regularly to deal with discrete issues concerning a particular PRC.

Since the detailed timesheets submitted by Adams on behalf of himself and the attorney he retained are generalized in nature, we are unable to isolate time spent on issues in which a substantial contribution was made. Had Adams been able to break down his efforts by issue, the breakdown would have facilitated the process of eliminating certain issues from the award. While we are reluctant to reduce the requested award by a percentage of hours claimed, Adams provides us with no other basis upon which to reach a judgment.

We have determined that Adams made a substantial contribution to the decision in the case of seven PRCs and that he did not make a substantial contribution — and in fact may have impeded the proceedings — in the case of six of the PRCs he sponsored. In other words, about half of the matters to which Adams devoted himself contributed substantially to the Commission's decision, and half did not. In other matters, the work of Adams was often duplicative of the positions taken by others, particularly CPSD. Accordingly, based upon a review of all of the PRCs and the contribution that Adams made (or did not make), we will exercise our judgment to reduce the hours claimed by Adams by 50%.

Next, we must assess whether the hours claimed for the customer's efforts that resulted in substantial contributions to Commission decisions are reasonable. Adams believes that the total number of hours claimed is reasonable given the scope of this proceeding and the complexity of the issues. With some exceptions, we agree that the hours set forth in the attachments to the compensation request are accurate and reflect an effort by Adams to eliminate time that was unproductive or duplicative.

Finally, in determining compensation, we take into consideration the market rates for similar services from comparably qualified persons.

Since his retirement from the Commission in 1990, Adams has provided forensic investigation and expert witness services on personal injury and property damage claims and in civil litigation involving electrical wires and facilities. He holds a B.S. degree in electrical engineering from Heald Engineering College in San Francisco, and has a California electrical contractor's license. In 2000, the Commission awarded Adams intervenor compensation at the rate of \$100 per hour for his work from 1998 to 1999 in the investigatory proceeding that led to D.00-01-009. The Commission arrived at the \$100 rate through a comparison of the rate paid to Gayatri Schilberg, an economist with JBS Energy, Inc. Since then, the Commission compensated Schilberg's work from 2001 to 2002 at the rate of \$130 per hour. (*See* D.02-11-020.) Since the Commission has increased the rates paid to Schilberg, Adams claims that his rate also should be increased from \$100 to \$130 per hour. We do not agree. Schilberg has more than 20 years of experience in economic and statistical research and has participated in more than 50 Commission cases on behalf of various consumer organizations. Adams has not demonstrated equivalent growth in experience since his hourly rate of \$100 was adopted by the Commission. Until a more persuasive showing is demonstrated, we will limit the increase for Adams. Based on his experience and background, we will increase the rate of compensation for Adams to \$110 per hour.

Following the workshops, Adams retained the legal services of Connie Easterly to assist in preparing opening and reply comments in support of the contested rule changes that Adams had sponsored and to prepare comments on the draft decision that was issued. Adams also retained the services of an

engineering consultant, Utility Design, Inc. (UDI). The request for award seeks \$24,321 for Easterly's attorney fees and \$603 for UDI consulting fees.

Pacific Gas and Electric Company (PG&E) questions the claimed compensation for Easterly and UDI, noting that Easterly was not retained by Adams until after the workshops. PG&E states:

"Mr. Adams' time records demonstrate that he spent the vast majority of his time on this Rulemaking prior to ever retaining Mr. Easterly and UDI. Furthermore, Mr. Easterly participated in this Rulemaking as his own representative, proposing the joint trenching rule changes in PRC 63 and 64. UDI also appeared as its own representative in this Rulemaking. It was UDI that proposed PRC 63 and 64 and the November 29, 2002 workshop. Review of the billing records attached as Exhibits B and C to the Adams Request reveals that Mr. Easterly and UDI devoted substantial time to the issues presented in PRC 63 and 64. Because Mr. Easterly and UDI had been proponents of PRC 63 and 64 in this Rulemaking long before they were retained as Mr. Adams' representatives in February 2004, PG&E submits that it would be wholly inappropriate for Mr. Easterly and UDI to obtain compensation as Mr. Adams' representatives regarding these same joint trenching proposals. To award such attorneys fees and consulting fees to Mr. Easterly and UDI would effectively circumvent the procedure for intervenor compensation in Public Utilities Code section 1804 *et seq.*" (PG&E Response, at 2-3.)

Moreover, PG&E states, the claimed contributions of Easterly and UDI to PRC 63 and 64 were not substantial, in that D.05-10-130 rejected both proposals. PG&E also questions the claim for 26 hours of Easterly's time to prepare the request for intervenor compensation, representing some \$7,150 in attorneys' fees.

Adams has responded to PG&E's comments, stating that he should be free to retain attorneys and consultants in the same manner that utilities do. However, he does not address the criticism of time claimed for PRCs that the Commission declined to adopt.

We believe that the observations of PG&E as to these claimed costs have merit. Our duty to ratepayers requires that awards ultimately paid by ratepayers are based on fees and costs demonstrated to be reasonable. Unlike most litigants, ratepayers generally have no direct control over the intervenors who purport to represent ratepayer interests, and unlike most advocates, intervenors need not submit their litigation budgets for a client's approval. Here, we find the requested amount on behalf of an attorney and consultants to be excessive in relation to the relatively informal workshop process and work products involved in this rulemaking. In the absence of an issue-by-issue analysis of work performed, we will exercise our judgment by reducing the requested attorney and consultant fees by 50%, the same reduction we have adopted for Adams' hours devoted to this proceeding.

Easterly is a California attorney with more than 17 years of experience in litigation, taxation and general business matters. His practice before the Commission began in 1996, and he has represented participants in the Commission's gas and electric line extension and undergrounding rulemaking proceedings. Adams seeks compensation for Easterly at a rate of \$265 per hour for 2004 and \$275 per hour for 2005. Adams states that these hourly rates are within the range of hourly attorney rates the utilities reported in the Commission's R.04-10-010 proceeding, which ranged from a low of \$205 to a high of \$576, depending on experience.

In D.02-11-019, the Commission awarded \$210 per hour for Easterly's legal services in the years 2000 and 2001 in the R.00-01-005 undergrounding proceeding. We find that the generalized justification for an increase in that rate is insufficient, and Adams has not shown that the increased rate is comparable to that of other attorneys participating in what has been primarily a workshop

proceeding like this one. We will retain the rate of \$210 for attorney work performed in this proceeding.

Adams seeks an hourly rate of \$175 for the work of expert Roger Poynts, who is the principal civil engineer for UDI-TETRAD Consulting Engineers, Inc., and who advised Adams on underground facilities issues. In D.00-12-005, Poynts was awarded an hourly fee of \$145 for work in 1997 and 1998. In D.02-11-019, this was increased to \$160 per hour. Adams has not justified a further increase in this proceeding, given the limited nature of the work performed. We will retain the rate of \$160 per hour for work performed in this proceeding. We accept the proposed hourly rate of \$150 for expert Jack Deschaine in 2004. Deschaine is director of utility operation for UDI-TETRAD Consulting Engineers, Inc., and his normal billing rate is \$160 per hour. Deschaine advised Adams on tree-trimming measures.

The itemized direct expenses submitted by Adams include costs for travel, photocopying and postage and total \$6,566. The cost breakdown included with the request shows the miscellaneous expenses to be commensurate with the work performed. We find these costs reasonable.

6. Award

As set forth in the table below, we award Adams \$34,006.

| <u>Advocate's Fees</u> | <u>Year</u> | <u>Hours</u> | <u>Rate</u> | <u>Amount</u> |
|---|-------------|--------------|-------------|---------------|
| William Adams | 2001 | 9.2 | \$110 | \$ 1,012 |
| | 2002 | 155.9 | \$110 | \$ 17,149 |
| | 2003 | 96.5 | \$110 | \$ 10,615 |
| | 2004 | 20.6 | \$110 | \$ 2,266 |
| | 2005 | 12.2 | \$110 | \$ 1,342 |
| <u>Less</u> 50% reduction for travel time and preparation of request ⁵ | | | | \$ (10,835) |
| Advocate's Fees – Subtotal | | | | \$ 21,549 |
| <u>Attorney's Fees</u> | | | | |
| Connie D. Easterly | 2004 | 34.6 | \$210 | \$ 7,266 |
| | 2005 | 21.9 | \$210 | \$ 4,599 |
| <u>Less</u> 50% reduction for preparation of compensation request ⁶ | | | | \$ (4,599) |
| Attorney's Fees – Subtotal | | | | \$ 7,276 |
| <u>Consultants' Fees</u> | | | | |
| Roger Poynts | 2004 | 0.95 | \$160 | \$ 152 |
| Jack Deschaine | 2004 | 0.9 | \$150 | \$ 135 |
| Consultant's Fees – Subtotal | | | | \$ 287 |
| <u>Other Expenses</u> | | | | |
| Travel, Transportation & Lodging | | | | \$ 5,566.57 |
| Photocopy costs | | | | \$ 746.50 |
| Postage and delivery | | | | \$ 252.93 |
| Total Other Expenses: | | | | \$ 6,566 |
| Total Fees and Other Expenses: | | | | \$ 35,678 |

⁵ Calculated by multiplying 197 hours of travel and preparation time by half the compensation rate (\$55).

⁶ Calculated by multiplying 43.7 hours of preparation time by half the compensation rate (\$105).

Consistent with previous Commission decisions, we order that interest be paid on the award amount (at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release H.15) commencing the 75th day after Adams filed his compensation request (or, June 6, 2005) and continuing until full payment of the award is made.

This rulemaking proceeding affected a broad array of utilities and others in the telecommunications and electrical fields. As such, payment of the compensation award shall be made from the Commission's intervenor compensation program fund, as described in D.00-01-020.

We remind all intervenors that Commission staff may audit their records related to this award and that intervenors must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. The records should identify specific issues for which compensation was requested, the actual time spent by each employee or consultant, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation was claimed.

7. Comments on Draft Decision

Pursuant to Pub. Util. Code § 311(g)(2) and Rule 77.7(f)(6) of the Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

8. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Glen Walker is the Assigned ALJ in this proceeding.

Findings of Fact

1. Adams has satisfied all the procedural requirements necessary to make the request for compensation.
2. Adams made a substantial contribution to at least seven of the 63 PRCs considered in this proceeding.
3. Adams sponsored six PRCs that the Commission rejected.
4. Requested hourly rates for Adams and the attorney and experts that Adams retained, as adjusted herein, are reasonable in that they reflect rates previously approved by the Commission or are comparable to the market rates for persons with similar training and experience.
5. The total of the reasonable compensation is \$35,678.

Conclusions of Law

1. Adams has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation, and is entitled to intervenor compensation for its claimed compensation, as adjusted herein, incurred in making substantial contributions to D.05-01-030.
2. The comment period should be waived, and today's order should be made effective immediately.

O R D E R**IT IS ORDERED** that:

1. William Adams is awarded \$35,678 as compensation for his substantial contribution to Decision (D.) 05-01-030.
2. Within 30 days of the effective date of this decision, the award to William Adams shall be paid from the intervenor compensation program fund, as described in D.00-01-020. Payment of the award shall include interest at the rate

earned on prime, three-month commercial paper as reported in Federal Reserve Statistical Release H.15, beginning June 6, 2005, the 75th day after the filing date of this request for compensation, and continuing until full payment is made.

3. The comment period for today's order is waived.
4. Rulemaking 01-10-001 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Compensation Decision Summary Information

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|----------------------------------|------------|
| Compensation Decision: | |
| Contribution Decision(s): | D0501030 |
| Proceeding(s): | R0110001 |
| Author: | ALJ Walker |
| Payer(s): | Commission |

Intervenor Information

| Intervenor | Claim Date | Amount Requested | Amount Awarded | Multiplier? | Reason Change/Disallowance |
|-------------------|-------------------|-------------------------|-----------------------|--------------------|--|
| William Adams | 3/21/05 | \$95,183 | \$35,678 | No | Failure to make substantial contribution; unreasonable costs |
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Advocate Information

| First Name | Last Name | Type | Intervenor | Hourly Fee Requested | Year Hourly Fee Requested | Hourly Fee Adopted |
|-------------------|------------------|-------------|-------------------|-----------------------------|----------------------------------|---------------------------|
| William | Adams | Engineer | William Adams | \$130 | 2001 | \$110 |
| William | Adams | Engineer | William Adams | \$130 | 2002 | \$110 |
| William | Adams | Engineer | William Adams | \$130 | 2003 | \$110 |
| William | Adams | Engineer | William Adams | \$130 | 2004 | \$110 |
| William | Adams | Engineer | William Adams | \$130 | 2005 | \$110 |
| Connie | Easterly | Attorney | William Adams | \$265 | 2004 | \$210 |
| Connie | Easterly | Attorney | William Adams | \$275 | 2005 | \$210 |
| Roger | Poynts | Analyst | William Adams | \$175 | 2004 | \$160 |
| Jack | Deschaine | Analyst | William Adams | \$150 | 2004 | \$150 |
| | | | | | | |